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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

PATRICIA M. TIERNEY,

Plaintiff and Respondent,

v.

RALPH L. STACEY, JR., as Executor, etc.

Defendant and Appellant.

B200516

(Los Angeles County
Super. Ct. No. NP 009743)

APPEAL from a judgment of the Superior Court of Los Angeles County, Roy Paul, Judge. Affirmed.

Jeffrey L. Garland for Defendant and Appellant.

Velasco Law Group, Richard J. Radcliffe; Madden, Jones, Cole & Johnson and Montgomery Cole for Plaintiff and Respondent.

* * * * *

Respondent Patricia M. Tierney filed a petition to set aside an amendment to the Edna P. Tierney Living Trust (hereafter the March 2002 amendment), which made Marie Stacey the sole beneficiary under the trust. Following a two-day trial in October 2004, the court granted the petition, concluding that the March 2002 amendment was the product of undue influence exercised by Stacey. Judgment was entered in October 2004.

In the ensuing appeal from the judgment, we concluded that a statement of decision should have been prepared and we remanded with directions to prepare and file a statement of decision. (*Tierney v. Stacey* (Sept. 19, 2006, B180387) [nonpub. opn.] (hereafter *Tierney I*.) We also addressed a number of ex parte orders that were entered in September 2005 by the Honorable Joseph Di Loreto; the trial judge had been the Honorable Roy L. Paul. Among other things, two of these orders required Stacey to pay Tierney \$115,442 and \$34,667.¹ There was nothing in the October 2004 judgment that supported these orders. We concluded that the court lacked jurisdiction to enter the ex parte orders of September 2005 and we therefore set aside and vacated those orders.

Following our remand, the trial court, per Judge Paul, prepared and filed a statement of decision. A judgment providing that the March 2002 amendment was void due to undue influence was entered on May 10, 2007, and this appeal followed. We affirm.

FACTS

1. Introduction

Edna P. Tierney, the decedent, was 86 years old in March 2002. Her only son, Joseph Tierney, died from cancer in October 2001. Respondent Patricia Tierney was Joseph's wife. Marie Stacey was Edna Tierney's sister.

¹ Cents are omitted.

Joseph Tierney was the sole beneficiary under the trust. Until September 21, 2000, Marie Stacey was the contingent beneficiary in the event of Joseph's² death. On that day, Edna replaced Marie with Patricia Tierney. This amendment specifically provided that Marie was to take nothing from the trust estate.

As we set forth more fully below, Edna Tierney suffered from several serious maladies and spent two months in a nursing home prior to January 2002, when she was released to go home. Patricia acted as Edna's primary caretaker throughout Edna's illnesses.

On February 25, 2002, Marie Stacey came from her home in Cincinnati, Ohio, to help with Edna's care and stayed until Edna died on August 25, 2002.

On March 8, 2002, Edna amended the trust again by removing Patricia Tierney as beneficiary and making Marie Stacey the sole beneficiary under the trust. It is this amendment, i.e., the March 2002 amendment, which is the subject of this appeal.

Marie Stacey died on October 26, 2007. Appellant Ralph L. Stacey, the executor of her estate, was substituted for Marie by our order of February 1, 2008.

2. The Statement of Decision

The appeal focuses on a number of alleged shortcomings of the statement of decision. A consideration of these contentions requires a summary of the statement of decision. In setting forth the summary, we adopt the outline and headings of the statement of decision. From time to time, we delve directly into the record.

(a) Background

Edna suffered from a number of serious medical conditions, including congestive heart failure, which caused her to be hospitalized on a regular basis; in 2002, she was taking 19 medications per day. In June 1999, Edna became the first patient in the Tele Medicine (Tele-Med) program adopted by Long Beach Memorial Hospital. The Tele-Med program allowed the hospital to place a video monitor in

² From time to time and where it causes no confusion, we refer to the parties by their first names. We do so for brevity's sake and intend no disrespect thereby.

Edna's home. A participant in the Tele-Med program is required to have sufficient caregivers in the home to ensure that the patient takes his or her medicines and that the patient's daily needs are met. When Edna was released from a two-month stay in a nursing home in January 2002, she required 24-hour care.

Patricia and Joseph assisted Edna after Edna's husband died in 1971 by looking after her healthcare and financial needs. They drove her to doctor's appointments, ran errands for her, paid her bills, and balanced her checkbook. After Edna's son Joseph died, Patricia continued to take responsibility for Edna's finances, banking and healthcare needs.

Marie Stacey, then about 80 years old, arrived on February 25, 2002. Within weeks of arriving, Marie terminated all of Edna's home care providers and forced Long Beach Memorial Hospital to remove the Tele-Med monitor. Three days after her arrival, Marie contacted a new attorney, i.e., not the attorney who had drafted the trust, to discuss Edna's estate. Marie also assumed control over Edna's banking and other financial accounts. And, as already noted, it was on March 8, 2002, that the amendment removing Patricia and making Marie the sole beneficiary was executed.

(b) Burden of Proof Requirement on the Issue of Undue Influence

The statement of decision states the applicable law on undue influence.

(c) Findings

The court ruled that the following three factors established a presumption of undue influence: There was a confidential relationship between Marie and Edna; Marie actively participated in the Procurement of the March 2002 amendment; and Marie received an undue profit from the March 2002 amendment in that Patricia Tierney was a more obvious object of Edna's testamentary disposition than Marie.³

³ "In this state, a presumption of undue influence arises when there is a concurrence of the following elements: 1) the existence of a confidential or fiduciary relationship between the testator and the person alleged to have exerted the undue influence; 2) active participation by such a person in preparation or execution of the will; and 3) an undue benefit to such person or another person under the will thus procured [citations]." (*Estate of Clegg* (1978) 87 Cal.App.3d 594, 602.) We do not

(1) Confidential Relationship Between Marie and Edna

The court found that the existence of a blood relationship between Marie and Edna showed that there was a confidential relationship between them. In addition to this circumstance, the court found that the interaction between the two women showed that there was a confidential relationship. Shortly after her arrival in February 2002, Marie took over the role of primary caregiver, fired the previous caregivers, and barred Patricia Tierney from entering the house. Marie also assumed complete control over Edna's finances.

(2) Marie Actively Participated in the Procurement of the March 2002 Amendment

Three days after she arrived, Marie telephoned Attorney Kenneth Zommick and inquired if he could assist Edna in changing or amending the trust. He said yes, after which Marie passed the telephone to Edna who told Zommick that she wanted to leave everything to Marie. On March 4, 2002, Marie accompanied Edna to Zommick's office where Edna and Zommick discussed, in Marie presence, Edna's wish to leave everything to Marie. On March 8, 2002, Zommick came to Edna's house with the March 2002 amendment that Edna signed while Marie was in another part of the house.

According to Zommick, Edna was not under Marie's influence when it came to the March 2002 amendment. Although the court noted that Zommick was a competent attorney with "significant experience," the court placed "very little weight" on Zommick's conclusion. The court gave seven reasons for this. First, Zommick testified in his deposition that if he had known about Edna's medical condition and the medications she was taking, he would have taken further steps to determine whether she was under undue influence. Second, although Zommick stated that he typically inquired about prior attorneys, he did not do so here. Third, Zommick conceded that he never saw any meaningful interaction between Marie and Edna. Fourth, Zommick

agree with appellant that there are six components to the presumption of undue influence.

spoke with Edna only three times. Fifth, Marie was present during the majority of the discussions about the March 2002 amendment. Sixth, Zommick never contacted any of Edna's healthcare providers. Seventh, Zommick wrote Patricia a letter stating that she should return certain bonds. Zommick sent a copy of this letter to Marie and not to Edna, which indicates that he had little contact with Edna. The court concluded that Zommick had not acted with due diligence and that he had failed to "properly evaluate whether Edna was being influenced by Marie" during the execution of the March 2002 amendment.

Marie told Bonnie Miller, a social worker who worked with Edna, that she was taking Edna to meet with an attorney. Miller asked Marie whether she was taking Edna to see the attorney who had drafted the original trust; Marie answered in the affirmative. The court found it "compelling" that Marie "went out of her way to misrepresent" the attorney Edna was meeting.

In fact, Miller was concerned over Edna's state of mind. Miller met with Edna on March 7, 2002, the day before Edna executed the March 2002 amendment, and came away from that meeting with concerns about Edna's ability to make changes in the trust.

The court reviewed the testimony of Joyce Gillette, a registered nurse at Long Beach Memorial Hospital, Nadine Akins, another nurse, and Miller; collectively, these three witnesses "painted a consistent picture of a woman whose physical health rapidly declined after Marie moved into the house." Miller filed a report with the Adult Protective Service that expressed her concern that Marie was not taking care of Edna and that Edna was being influenced by Marie. Gillette explained that the Tele-Med had to be removed because the hospital's liability "was too high," given the "caregiving situation orchestrated by her sister." Nadine Akins, who had been giving Edna 24-hour care, stated that Marie fired her because Nadine would not drive Marie and her husband around.

The court found Gillette, Akins and Miller to be credible, with their concerns noted in contemporaneous writings. On the other hand, the court questioned Marie's

credibility, rejecting her assertion that Akins and Gillette summarily quit on their own volition.

Significantly, Edna told Akins the day after Edna executed the March 2002 amendment that she was confused about the fact that an attorney had come to see her and that she did not understand what she was doing. Patricia Tierney testified that Edna called her and told her she had signed something but that she did not know what she had signed. When Patricia explained to Edna the change in the trust effected by the March 2002 amendment, Edna started to cry. In Patricia's words, Edna said that "that's not what I want, and she [Edna] said that's not what Joe would want."

The court noted that, standing alone, procuring an attorney and accompanying Edna to see that attorney, i.e., Zommick, did not amount to actively participating in the preparation and execution of the March 2002 amendment. The additional evidence, however, that we have summarized above "established by clear and convincing evidence that Marie actively participated in procuring" the March 2002 amendment.

(3) Marie Received an Undue Profit from the March 2002 Amendment

The court analyzed in some detail Edna's relationship with Patricia and with Marie, comparing one to the other. Because the contrast is so clear, it is not necessary to delve into the details of this comparison. The overarching facts are that Patricia had been actively taking care of Edna for 35 years but that Marie had visited Edna only half a dozen times in 45 years, and not at all in 2000 and 2001. The court also found that Patricia's children would be considered to be objects of Edna's "natural bounty." Given the long and intense involvement by Patricia with Edna, and the lack of such a connection between Edna and Marie, the finding that Patricia and not Marie was the more obvious object of Edna's testamentary disposition is amply supported by the evidence.

The court concluded that the evidence supported the presumption that the March 2002 amendment was the product of undue influence. Accordingly, the court turned to the question whether Marie met her burden of proof that there was no undue influence.

(d) Marie Failed to Carry Her Burden of Proof That the March 2002 Amendment Was Not the Product of Undue Influence

The court found that Marie's case relied on the testimony of two witnesses, i.e., Attorney Zommick and Marie. As already noted, the court did not find Zommick's testimony persuasive.

The court did not find Marie to be credible. The court pointed to several conflicts and inconsistencies in her testimony. At one point she stated that she called Zommick to discuss Edna's bonds but Zommick testified that she called about amending the trust. Marie testified that she did not know about the trust until they arrived for the first time at Zommick's office but a little later she testified that Edna told her about the trust before meeting with Zommick. Marie stated she never met Bonnie Miller, the social worker, but Miller recorded telling Marie that Edna needed a caregiver at least six hours a day and that Marie agreed with this. The court found that "Marie was misrepresenting a majority of the facts to the court. [¶] Of even greater importance to the court, is that Marie was unable to provide the court with any credible explanation for discharging Nadine Akins, orchestrating the removal of the Tele-Med unit, or writing herself and her husband over \$26,000 from Edna's account."

The court found the testimony of Miller, Akins and Gillette credible that soon after Marie's arrival they became concerned over the fact that Marie was not providing Edna with proper care. The court rejected Marie's explanation for writing over \$26,000 in checks to herself and her husband, which was that this money was used to pay bills. The court noted that all of Edna's bills were on automatic bill pay.

(e) Patricia Tierney Produced Clear and Convincing Evidence That the March 2002 Amendment Was the Product of Undue Influence by Marie

The court again reviewed the evidence, this time under the assumption that the evidence did not establish a presumption of undue influence. If this was the case, the question was whether Patricia Tierney had presented clear and convincing evidence of undue influence. The court answered this question in the affirmative.

Without restating the same evidence we have already summarized, here we note only the court's major factual conclusions.

The court found that the disposition made by the March 2002 amendment was not natural, i.e., that Patricia Tierney was the natural object of Edna's bounty. The court found that in February-March 2002 Edna was in a weakened physical, mental and emotional state. The March 2002 amendment contradicted Edna's previously stated intentions, which were that Patricia Tierney would be the beneficiary under the trust. The court concluded that "Marie took active steps to isolate Edna from her healthcare [*sic*] providers, friends and family members, leaving Edna completely dependent on Marie for all of her health care and financial needs." Finally, the court concluded that Marie actively participated in procuring the March 2002 amendment.

3. The Judgment

The judgment provides that the March 8, 2002 amendment is void due to the fact that it was the product of undue influence. The judgment also provides that Marie Stacey holds all assets of the trust and estate of Edna Tierney, including income therefrom, as constructive trustee for the benefit of the persons entitled to the distribution of Edna Tierney's estate.

DISCUSSION

1. No Findings Were Required About the \$150,109 That Patricia Tierney's Counsel Demanded in December 2004 to Settle the Case

As we noted in *Tierney I*, on September 9, 2005, almost one year after the trial took place, Judge Di Loreto directed Marie Stacey to pay Patricia Tierney \$115,442 and \$34,667, or a total of \$150,109. As we discussed in *Tierney I*, this was the sum demanded by Patricia Tierney's counsel in December 2004 to settle the case. Without restating our entire discussion in *Tierney I*, here we note only that we set aside this order because it was entered ex parte and because this sum was nothing but a settlement demand, i.e., there was nothing in the record of the trial that supported this award.

Stacey⁴ contends that the trial court should have made findings about the sums of \$115,442 and \$34,667. We do not agree. In the first place, these sums were demands for settlement. As we noted in *Tierney I*, the bases for this demand are not readily apparent, although it can be assumed that it is an approximation of what Patricia Tierney thought that Marie Stacey had taken from Edna's estate. Secondly, the judgment entered on May 10, 2007, provides that Marie Stacey holds all assets of the trust and estate of Edna Tierney, including income therefrom, as constructive trustee for the benefit of the persons entitled to the distribution of Edna Tierney's estate. Thus, whatever sums of money Marie Stacey acquired from Edna and her estate are held by Marie Stacey's estate (see fn. 4, *ante*) as constructive trustee for the benefit of the person or persons who are entitled to Edna Tierney's estate. That is perfectly sufficient for the purposes of this case.

2. Stacey Is Holding the Long Beach House as a Constructive Trustee for the Benefit of Patricia Tierney

Judge Di Loreto also issued an ex parte order on September 9, 2005, directing Marie Stacey to execute a grant deed transferring the residence at 3923 McNab Avenue in Long Beach to Patricia Tierney. We also set aside this order in *Tierney I*. Stacey contends that the statement of decision should have contained a finding on what Stacey refers to as the "house in Long Beach."

Stacey is mistaken in contending that the statement of decision is silent on the matter of the Long Beach house. In fact Marie Stacey's estate presently holds title to this house, the estate does so under the terms of the May 10, 2007 judgment as constructive trustee for the benefit of the person or persons who are entitled to Edna Tierney's estate, i.e., Patricia Tierney.

⁴ Since Marie Stacey passed away in October 2007 and her husband Ralph Stacey, the executor of her estate, was substituted for her in this appeal, we will in the balance of the opinion refer to "Stacey" as the litigant on appeal, rather than to Marie.

3. The Statement of Decision Disposed of All Affirmative Defenses That Were Material

Stacey contends that the trial court erred in not discussing in the statement of decision the affirmative defenses that were raised in the answer to Patricia Tierney's petition to set aside the March 2002 amendment.

"The court shall issue a statement of decision explaining the factual and legal basis for its decision as to each of the principal controverted issues at trial upon the request of any party appearing at the trial." (Code Civ. Proc., § 632.) "A trial court rendering a statement of decision under Code of Civil Procedure section 632 is required only to state ultimate rather than evidentiary facts. . . . Only where a trial court fails to make findings as to a material issue which would fairly disclose the determination by the trial court would reversible error result. Even though a court fails to make a finding on a particular matter, if the judgment is otherwise supported, the omission is harmless error unless the evidence is sufficient to sustain a finding in favor of the complaining party which would have the effect of countervailing or destroying other findings. A failure to find on an immaterial issue is not error." (*Nunes Turfgrass, Inc. v. Vaughan-Jacklin Seed Co.* (1988) 200 Cal.App.3d 1518, 1525.)

The foregoing authorities dispose of Stacey's contention. Stacey's affirmative defenses were either immaterial or were actually addressed and disposed of by the statement of decision.

The issue under the petition filed by Patricia Tierney was whether the March 2002 amendment was void and invalid because it was procured by undue influence. The second, third and seventh affirmative defenses alleged that, under a will of April 8, 2002, Marie Stacey, and not Patricia Tierney, was entitled to Edna's estate. But whether there was such a will was not material because Marie Stacey opposed Patricia Tierney's petition on the ground that the March 2002 amendment was valid. That is, the issue was whether Marie Stacey was entitled to Edna's estate under the March 2002 amendment; whether Marie was a beneficiary under an alleged April 8, 2002 will was not material in the proceedings on Patricia Tierney's petition. But, even

if the alleged will of April 8, 2002, is material to the disposition of Patricia Tierney's petition, Stacey failed to cite to any "evidence . . . sufficient to sustain a finding in favor of the complaining party which would have the effect of countervailing or destroying other findings." (*Nunes Turfgrass, Inc. v. Vaughan-Jacklin Seed Co.*, *supra*, 200 Cal.App.3d at p. 1525.) Thus, if there was error, and we do not find that there was error, it was harmless.

The fourth, fifth and sixth affirmative defenses respectively alleged laches, estoppel and unclean hands as defenses. None of these defenses was actually litigated in the trial and there is therefore no evidence that supports any of these defenses. In any event, Patricia Tierney's petition was filed on September 10, 2002, which disposes of laches as a defense. As far as estoppel and unclean hands are concerned, the clear import of the statement of decision is that it was Marie Stacey and not Patricia Tierney who was estopped and who had unclean hands.

The first affirmative defense merely alleges that the petition fails to state facts sufficient to constitute grounds for which relief may be granted. In concluding that the March 2002 amendment was void, the statement of decision squarely disposes of this defense.

4. The Statement of Decision Is Not Defective

Stacey contends that the statement is defective and incomplete because of the alleged deficiencies that we have addressed in parts 1, 2 and 3 of the Discussion, *ante*. We have explained why Stacey is mistaken. In fact, we find the statement of decision to be thorough and complete in all respects. It certainly explains "the factual and legal basis for its decision as to each of the principal controverted issues at trial." (Code Civ. Proc., § 632.)

5. The Finding of Undue Influence Is Supported by Substantial Evidence

Relying principally on Marie Stacey's testimony, Stacey contends that there is no substantial evidence that supports the finding of undue influence.

In contending on appeal that there is no substantial evidence that supports the judgment, an appellant may not rely on only those facts that favor his or her side of the

question and ignore the evidence that favors the respondent and supports the judgment. (*Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1246.) The error of a lack of substantial evidence is *deemed waived* if this rule is violated. (*Ibid.*) This rule is important in that it precludes an appellant from effectively ignoring the judgment and retrying the case on its facts in the appellate court. This rule applies whether the case is tried to a court or a jury. (*Piedra v. Dugan* (2004) 123 Cal.App.4th 1483, 1489.)

Stacey's claim of a lack of substantial evidence is all the more remarkable because he concedes that there was a confidential relationship between Edna and Marie. The claim of a lack of evidence is therefore limited to whether Marie actively participated in the March 2002 amendment and whether Marie unduly profited because Patricia Tierney was the more obvious object of Edna's bounty. And on these two issues the evidence that supports the judgment is compelling. It is no exaggeration to say that Marie single-handedly brought about the March 2002 amendment and that her displacement of Patricia Tierney is shocking in its speed and ruthlessness.

Although we need not discuss the matter at all since Stacey is deemed to have waived this contention, we wish to make two observations. First, the trial court's analysis of Attorney Zommick's role, or rather lack of a role, is well-grounded, and, in our view, it is correct on all counts. Second, Stacey's claim that the testimony of Miller, Gillette and Akins is peripheral borders on the specious. The testimony of these caregivers goes to the heart of the matter, which was Edna's physical, mental and emotional vulnerability and Marie's successful effort to exploit those vulnerabilities.

6. Stacey's Claims That the Statement of Decision Is Wrong, Incomplete and Misleading Are Without Merit

Stacey's claim that the statement of decision is wrong, incomplete and misleading relies, for the most part, on Marie Stacey's testimony. Thus, Stacey contends the statement of decision is wrong in suggesting that Marie selected Zommick to prepare the amendment and is also wrong in stating that Marie forced the removal of the Tele-Med.

Not only do these claims violate settled rules of appellate jurisprudence,⁵ the fact that Marie testified to the contrary does not make these findings wrong. In fact, the trial court, who is *exclusively* charged with the determination of the credibility of witnesses (*Maslow v. Maslow* (1953) 117 Cal.App.2d 237, 243), found that Marie was not a credible witness. Thus, there are two reasons to disregard Marie’s testimony. We disregard evidence that is in conflict with the trial court’s determination that rests on substantial evidence (see fn. 5, *ante*), and we accept, as we must, the trial court’s finding that she is not credible.

Stacey contends that the trial court’s determination that Patricia Tierney was the more obvious object of Edna’s bounty is “quite astonishing.” We do not find it astonishing that, taking into account Patricia’s 35 years of loyal assistance and support, the court concluded that Marie’s half a dozen visits over a period of 45 years (and none during 2000-2001 when Edna was ill) would weigh less heavily than Patricia’s dedication. Indeed, it is difficult to see how anyone could arrive at a different conclusion.

We find it unnecessary to address in detail other purported defects in the statement of decision as these claims are based on Marie’s version of the events.

7. The Finding That There Was No Credible Explanation Why Marie Stacey Wrote over \$26,000 in Checks to Herself and Her Husband Is Affirmed

The trial court found that “Marie was misrepresenting a majority of the facts to the court. [¶] Of even greater importance to the court, is that Marie was unable to provide the court with any credible explanation for discharging Nadine Akins, orchestrating the removal of the Tele-Med unit, or writing herself and her husband over \$26,000 from Edna’s account.”

⁵ “Where statement of decision sets forth the factual and legal basis for the decision, any conflict in the evidence or reasonable inferences to be drawn from the facts will be resolved in support of the determination of the trial court decision.” (*In re Marriage of Hoffmeister* (1987) 191 Cal.App.3d 351, 358.)

Stacey contends that the finding about writings checks over \$26,000 to herself and her husband is not specific enough. This finding rests on eight checks (exhibit No.'s 54, 55, 57-62) that Marie admitted she had signed. Because the court did not order Marie to repay the sum that these eight checks represented, there was no need to specify the exact amount.⁶

Stacey also claims that Marie wrote these checks to cover Edna's bills and expenses. The fact is, however, that Marie testified either that she did not recall what the check was for or she admitted that the check was written for her, or for her husband's, benefit, such as costs of travel and airfare for her husband. Marie identified only one check for \$300 as being "probably" for groceries and bills. Given this testimony, it is evident that the trial court's finding that there was no credible explanation for these checks is eminently correct.

DISPOSITION

The judgment is affirmed. Respondent is to recover her costs on appeal.

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FLIER, J.

We concur:

RUBIN, Acting P. J.

BAUER, J.*

⁶ We note that these eight checks total \$25,300. Two of these checks were for \$10,000 and \$11,300 and were made payable to Ralph Stacey. When asked to explain the second check, the totality of Marie's response was: "That was the check that -- Edna had promised Ralph [Stacey] to come and stay, and she was very ill at the time." We agree with the trial court that an "explanation" of this sort for a check of \$11,300 is not credible.

* Judge of the Orange Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.